SUPREME COURT, U. S.

FILED

MAR 28 1969

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1968

No. 1119

UNITED STATES OF AMERICA, for the Use and Benefit of the TRANE COMPANY,

Petitioner,

against

[redacted]; BENJAMIN GELMAN, doing business as GELCO BUILDERS, BURJAY CONSTRUCTION CORPORATION, NATIONAL SURETY CORPORATION and the HANOVER INSURANCE COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RAYMAR CONTRACTING CORP., BENJAMIN GELMAN, doing business as GELCO BUILDERS, BURJAY CONSTRUCTION CORPORATION, NATIONAL SURETY CORPORATION and the HANOVER INSURANCE COMPANY,

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Questions Presented

1. Was the Court of Appeals in error in affirming the judgment of the District Court holding that there was not a "ratification" by use-plaintiff of a certain contract on which it sought to rely?

2. Assuming *arguendo* that the Court of Appeals and the District Court were in error as to "ratification" and that therefore use-plaintiff may rely on the allegedly "ratified" contract, what construction should be given, on the facts that would then be presented, to the one-year limitation provision of the Miller Act (40 U.S.C. §270(b)? The majority opinion of the Court of Appeals did not reach the question of statutory construction and accordingly made no mention of it.

Statement of the Case

Although respondents in several respects do not concur with petitioner's Statement of the Case, it is respectfully believed that at this juncture, treating solely with the question of the granting of certiorari, it is not necessary to burden this brief with a counter-statement.

ARGUMENT

1. The decision of the Court of Appeals was in no way in conflict with applicable state law.

Petitioner's basic contention is stated in its brief in the words of Rule 19, *viz.*, that the Court of Appeals ". . . decided an important state . . . question in a way in conflict with applicable state . . . law". However, we respectfully submit that a reading of petitioner's brief on this point establishes that petitioner does not contend that the Court of Appeals was not fully and correctly aware of the state law relating to "ratification" of a contract. It is plain from petitioner's own brief that it is complaining merely that the findings of fact in the District Court and the Court

of Appeals were against the weight of the evidence and that these findings of fact should be reviewed by this Court. Respectfully, we submit that this does not present a "special or important reason" for granting the writ.

2. The Court of Appeals did not decide an important question of federal law.

It is not possible for petitioner even to state its second point in the words of Rule 19 because, as petitioner's brief acknowledges, the majority opinion of the Court of Appeals did not reach and therefore did not discuss, let alone decide, the alleged "important question of federal law which has not been, but should be, settled by this Court".

On this point, petitioner seems to be contending that if this Court grants the writ and reverses the factual findings of the lower courts, it should then also instruct the Court of Appeals for the Second Circuit as to the construction to be given to 40 U.S.C. §270b(b) even though that Court has not yet expressed itself on this subject. In this respect, it may be pertinent to note that no Court of Appeals has as yet construed 40 U.S.C. §270b(b) in a fact situation such as here would be presented if there had been a "ratification" found. There is therefore no conflict between circuits.

Conclusion

Respondents respectfully pray that the instant application for a writ of certiorari be denied.

Respectfully submitted,

JACK HART
Attorney for Respondents